FILED BY CLERK
JUL 31 2008
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MARSHA LYNN STRINGER, Appellant.	2 CA-CR 2007-0175 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20061177

Honorable Hector E. Campoy, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Katia Méhu
Phoenix
Attorneys for Appellee

Law Office of David Alan Darby
By David Alan Darby
Tucson
Attorney for Appellant

V Á S Q U E Z, Judge.

¶1 A jury found Marsha Stringer guilty of third-degree burglary, and the trial court sentenced her to four years in prison. On appeal, she argues the court abused its discretion by failing to excuse a juror for cause and by denying her motion for judgment of acquittal under Rule 20, Ariz. R. Crim. P. For the reasons set forth below, we affirm.

Facts and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict. *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.2d 669, 670 (App. 2005). On March 15, 2006, Pima County Deputy Sheriff Robert Svek was on patrol when he observed a 1997 Saturn traveling in an unincorporated area of Pima County near Tucson. Checking on the car's license plate, he learned the car had been reported stolen. After requesting backup, Svek pulled the car over and ordered the driver, Stringer, and the passenger, Jimmy Davis, to step out of the vehicle. As he was placing Davis in handcuffs, Svek noticed that Davis was holding a manipulation key.[1]

¶3 Another deputy, Santiago Hernandez, handcuffed Stringer and placed her in the back of a patrol car. He then informed Stringer of her rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), and she agreed to give a statement. Initially, Stringer denied knowing that the vehicle had been stolen, but when Hernandez walked away to consult with Svek, she called him back and admitted she knew it was a stolen vehicle. She stated she had

[1]A "[m]anipulation key" is "a key, device or instrument, other than a key that is designed to operate a specific lock, that can be variably positioned and manipulated in a vehicle keyway to operate a lock or cylinder." A.R.S. § 13-1501(8).

been driving the car since the previous day and had been expecting to be pulled over. Stringer also stated she wanted to return the vehicle to its owner and had called the owner's insurance company in an effort to do so.

¶4 When the deputies inspected the car, they discovered there was no key in the ignition and the ignition and steering column were severely damaged. In the trunk, they found bolt cutters, a crowbar, a prescription bottle bearing Davis's name, and various items of personal property. Davis admitted the bolt cutters belonged to him.

¶5 Stringer was indicted for theft of a means of transportation and third-degree burglary. The state also alleged she had three prior felony convictions. At trial, the state moved to amend the theft count to charge Stringer with the lesser included offense of unlawful use of means of transportation. Stringer did not object, and the court granted the state's motion to amend the indictment.

¶6 The jury found Stringer guilty of third-degree burglary but not guilty of unlawful use of a means of transportation. Stringer admitted having one historical prior felony conviction, and the state dismissed the remaining allegations. The trial court sentenced her to an enhanced, mitigated, four-year prison term, and Stringer timely appealed. We have jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Discussion

Failure to strike juror for cause

¶7 Stringer argues the trial court erred in denying her motion to strike juror M. for cause when M. expressed her belief that Stringer "should speak for herself" by testifying at trial. Stringer asserts she was prejudiced because she was forced to use one of her peremptory strikes to remove juror M. from the panel.

¶8 We review a trial court's decision on a motion to strike a juror for cause for abuse of discretion. *State v. Hickman*, 205 Ariz. 192, ¶ 39, 68 P.3d 418, 427 (2003). A defendant challenging the court's decision bears the burden of proving both that the trial court erred in not striking the juror and that the error prejudiced the defendant. *Id.* ¶ 28. To show an abuse of discretion, Stringer must establish that the prospective juror could not render a fair and impartial verdict based on the evidence. *State v. Medina*, 193 Ariz. 504, ¶ 18, 975 P.2d 94, 101 (1999). And, to show prejudice, she must establish that the trial court's decision left her unable to "secure[] an impartial jury."[2] *Hickman*, 205 Ariz. 192, ¶ 31, 68 P.3d at 425.

[2]Contrary to Stringer's argument, a defendant's being forced to use a peremptory challenge does not, by itself, constitute prejudice. Instead of causing prejudice, use of a peremptory challenge may ensure that the case is decided by a fair and impartial jury. *Hickman*, 205 Ariz. 192, ¶ 41, 68 P.3d at 427; *see also State v. Cruz*, 218 Ariz. 149, ¶ 28, 181 P.3d 196, 205 (2008) ("Even if a defendant is forced to use a peremptory challenge to remove a juror who should have been excused for cause, however, an otherwise valid criminal conviction will not be reversed unless prejudice is shown.").

¶9 Stringer claims that, "[w]hen a prospective juror states that they expect to hear from the defendant in her own defense, this can only be perceived as a long and deeply held belief on the part of that juror." She therefore contends juror M. could not be rehabilitated because "[i]t is totally illogical to assume that a long held belief can truly be dispelled after a mere few minutes of oratory by the trial court."

¶10 But nothing in the record supports Stringer's assertion that juror M.'s comment evinced "a long and deeply held belief." And, to the extent she suggests juror M. could not be rehabilitated, we disagree. A juror may be excused for cause if he or she expresses serious misgivings about his or her ability to remain unbiased. *State v. Smith*, 182 Ariz. 113, 115, 893 P.2d 764, 766 (App. 1985); *see also* Ariz. R. Crim. P. 18.4(b). However, "preconceived notions or opinions about a case do not necessarily render that juror incompetent to fairly and impartially sit in a case." *State v. Martinez*, 196 Ariz. 451, ¶ 28, 999 P.2d 795, 803 (2000). A prospective juror may be rehabilitated by further inquiry establishing that he or she is "willing and able to put personal opinion aside and weigh the evidence as the law requires." *State v. Hill*, 174 Ariz. 313, 319, 848 P.2d 1375, 1381 (1993).

¶11 Although juror M. first expressed her belief that Stringer should testify, when the trial court asked whether she would be able to set aside that preconceived notion and follow the law, she responded unequivocally that she could:

[JUROR M.]: Just one comment. I do—I do think [Stringer] should speak for herself, because you said she's not—we're not going to be hearing from her, and I—just this being her case, I mean, we should be hearing her side.

. . . .

[THE COURT]: [We] require the State to prove [a defendant's] guilt with evidence of its own. In this society and this system, we don't require people to testify. They have an absolute right not to. It's part of our Constitution.

. . . .

[E]ven though it's a natural curiosity that we would want to hear from people, we can't allow that curiosity any weight or any moment. It has no significance if she chooses, after talking with [her attorney], to not present any evidence or not testify.

So understanding the natural curiosity, . . . do you think you'd be able to disregard that fact and not require her to testify?

[JUROR M.]: Yeah. Just look at the evidence.

[THE COURT]: Okay. And it's a rule. It's not a rule that I made up[. W]e don't require people to testify, and we can't use it against them when they don't.

Can you follow that law Ms. M[.]?

[JUROR M.]: Yeah.

¶12 There is nothing in this exchange to suggest juror M. could not follow the law as she stated she could. The trial court had the opportunity to observe the juror's demeanor

and was satisfied with her response.[3] And "[t]rial judges are permitted to determine a potential juror's credibility when deciding whether to strike a juror for cause." *State v. Glassel*, 211 Ariz. 33, ¶ 50, 116 P.3d 1193, 1208 (2005). We conclude the trial court did not abuse its discretion in denying Stringer's motion to strike juror M. for cause.[4]

Failure to grant Rule 20 motion

¶13 Stringer next contends the trial court erred in denying her Rule 20 motion for judgment of acquittal. We review a trial court's ruling on a motion for judgment of acquittal for an abuse of discretion. *State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 32, 154 P.3d 1046, 1056 (App. 2007). We will reverse only if there is "no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20. "If reasonable persons could differ as to whether the evidence establishes a fact in issue, then the evidence is substantial." *State v. McCurdy*, 216 Ariz. 567, ¶ 14, 169 P.3d 931, 937 (App. 2007). The substantial evidence necessary to support a conviction may be either direct or circumstantial. *State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005).

---

[3]The trial court did strike another juror for cause. That juror held the same preconceived notion as juror M. and likewise stated she could follow the law. But, apparently dissatisfied with her response, the court questioned her further and finally dismissed her for cause.

[4]Because we find no error, we need not reach the question whether Stringer was prejudiced. In any case, Stringer does not specify how she was prejudiced by the alleged error. She does not claim she was forced to use all her peremptory strikes or accept an objectionable juror. *State v. Hickman*, 205 Ariz. 192, ¶ 41, 68 P.3d at 427.

¶14 Stringer was charged with burglary in the third degree pursuant to A.R.S. § 13-1506. A person commits that offense either by "entering or remaining unlawfully in or on a nonresidential structure . . . with the intent to commit any theft or any felony therein" or by "[m]aking entry into any part of a motor vehicle by means of a manipulation key or master key, with the intent to commit any theft or felony in the motor vehicle." A.R.S. § 13-1506(A)(1), (2). The definition of "nonresidential structure" includes a motor vehicle. *See* § 13-1501(10), (12). Thus, the state needed only to prove that Stringer entered or remained in the car with the intent to commit a theft or felony.

¶15 Stringer first contends the evidence established she "was merely driving a car which she acknowledged she knew was stolen." She argues the state did not prove her "intent upon entry of the vehicle, or what her intent was thereafter." She points to her acquittal on the charge of unlawful use of a means of transportation as "clearly signaling [the jury] didn't believe her intent was to commit a theft or . . . unlawful use, and that it was her intent to return the car to its owner." We disagree.

¶16 The crime of burglary is complete when a person enters the structure with the requisite intent; completion of the intended, underlying felony is not required. *State v. Bottoni*, 131 Ariz. 574, 575, 643 P.2d 19, 20 (App. 1982). "Acquittal of that underlying charge does not necessitate an acquittal on the separate and distinct charge of burglary." *Id.; see also State v. Zakhar*, 105 Ariz. 31, 32, 459 P.2d 83, 84 (1969) ("consistency between the verdicts on the several counts of an indictment is unnecessary").

¶17 Here the evidence showed Stringer was apprehended while driving a car that had been reported stolen two weeks earlier. Upon questioning, Stringer admitted she had been driving the vehicle for almost two days, she knew the vehicle was stolen, and she had been expecting to be pulled over. There was no key in the ignition, and the ignition and steering column were both damaged. Furthermore, a manipulation key was recovered from the male passenger, and in the trunk were bolt cutters, a crowbar, and other property belonging to Stringer and her passenger.

¶18 There was thus ample evidence for the jury to conclude Stringer, at the very least, had remained in the vehicle with the intent to control the stolen vehicle and not return it to its owner. *See* § 13-1506(A)(1); *see also State v. Aro*, 188 Ariz. 521, 524, 937 P.2d 711, 714 (App. 1997) (rejecting argument that statute requires theft inside car and not of car itself); *State v. Brown*, 188 Ariz. 358, 359, 936 P.2d 181, 182 (App. 1997) (same). "[E]vidence of the possession of the stolen property, coupled with [Stringer's] inconsistent and unlikely explanations, w[as] sufficient to allow the . . . case to go to a jury.[5] *State v.*

[5]Although the jury acquitted Stringer on the underlying felony, unlawful use of means of transportation, it is entirely possible it did so because it disbelieved she intended to return the vehicle to its owner. The trial court instructed the jury that to convict of unlawful means of transportation it had to find the state had proven "the defendant knowingly took unauthorized control over another's means of transportation" and "did so without intending to deprive the owner of it permanently." The only evidence of Stringer's claimed intent to return the vehicle was her statement to the arresting officer, which the jury was free to accept or discredit. *See State v. Lehr*, 201 Ariz. 509, ¶ 29, 38 P.3d 1172, 1180 (2002).

Fierro, 166 Ariz. 539, 547, 804 P.2d 72, 80 (1990); *see also State v. Hunter*, 102 Ariz. 472, 475, 433 P.2d 22, 25 (1967).

¶19 Stringer nevertheless contends there was no showing that she knew the passenger had the manipulation key, that she had ever had it in her possession, or that the key was her means of entering or starting the vehicle. As we noted above, § 13-1506 describes two ways to commit third-degree burglary. "Subsection (A)(2) creates a crime narrower in scope than subsection (A)(1) because it requires the use of a manipulation or master key to gain entry to a motor vehicle. Subsection (A)(1), however, does not specify any particular method of entry that must be proven to support a conviction." *State v. Hamblin*, 217 Ariz. 481, ¶ 10, 176 P.3d 49, 52 (App. 2008). And, in any event, given the passenger's possession of the manipulation key and the lack of evidence of any other method of entering or starting the engine, the jury could reasonably infer Stringer knew about the key and that it was the means of entering and starting the vehicle. *See* § 13-1506(A)(2); *see also Hamblin*, 217 Ariz. 481, ¶ 10, 176 P.3d at 52 ("an individual who has violated § 13-1506(A)(2) has also violated subsection (A)(1)"). Because reasonable minds could differ on the inferences to be drawn from the evidence, the trial court did not abuse its discretion in denying Stringer's motion for a directed judgment of acquittal.

Disposition

¶20 For the foregoing reasons, we affirm Stringer's conviction and sentence.

_____

GARYE L. VÁSQUEZ, Judge

CONCURRING:

_____

PETER J. ECKERSTROM, Presiding Judge

_____

PHILIP G. ESPINOSA, Judge